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IN THE

Supreme Court of the United States

OCTOBER TERM 1949

NO. 499

EDITH CHURCH, PETITIONER

v.

THE PEOPLE OF THE STATE OF MICHIGAN

On Petition for writ of Certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

Stephen J. Roth
Attorney General of the State of Michigan

Edmund E. Shepherd
Solicitor General of the State of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent

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I

Opinions Below.

The only opinion published in the transcript of record (126-128) is that of the circuit judge denying petitioner's motion (SR 11-12) for new trial.[*] Since under the law of

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[*] Numbers in parentheses refer to pages of the transcript of record of the trial court, while those preceded by the symbol "SR" refer to pages of the transcript of record and proceedings in the supreme court of Michigan.

Michigan,[1] and the rules of her supreme court,[2] an appeal in criminal cases is allowed only in the discretion of the supreme court on proper application therefor, no opinion is rendered or published and no reason is assigned for denial thereof.[3]

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[1]

Mich. Code of Criminal Procedure, Chap. x, § 3, Mich. Comp. Laws, 1948, § 770.3, Mich. Stat. Ann. [Henderson] § 28.1100.

[2]

Mich. Court Rules 55-60.

[3]

Denial by the highest court of Michigan, of an application for leave to appeal from the judgment in a criminal case, does not litigate the merits, nor does it set a precedent. Cf. the effect of denial of certiorari by this Court, as explained by Mr. Justice Frankfurter, State v. Baltimore Radio Show, 70 S. Ct. 252, 94 U.S. [L.ed.] 240.

II

Counter-Statement on Jurisdiction.

The petitioner, we assume, invokes this Court's jurisdiction under § 1257 (3), Title 28, U.S.C., as revised.

It is briefly our position:

(1) that the questions stated in the petition for certiorari were not timely or properly presented to the courts below in compliance with recognized Michigan procedure;[4]

(2) that the supreme court of the State, in denying leave to appeal, without expressing an opinion, did not necessarily decide any federal question, substantial or otherwise, such denial probably resting (SR 15) on adequate and independent non-federal grounds; and

(3) that no federal question now presented by petitioner, possesses substance.

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[4]

The procedure mapped by Michigan for asserting violation of constitutional guarantees against unreasonable searches and seizures, is a pretrial motion to suppress the evidence seized. People v. Marxhausen, 204 Mich. 559, cited in Table F, Appendix, opinion in Wolf v. Colorado, 338 U.S. 25, 36. See, also, People v. Vulje, 223 Mich. 656; People v. Londe, 230 Mich. 484; People v. Feltner, 234 Mich. 209; People v. Bass, 235 Mich. 588; People v. Hayek, 243 Mich. 246; and People v. Heibel, 305 Mich. 710.

III

Counter-Statement of the Case.

We respectfully note the following inaccuracies and insufficiencies in petitioner's statement (Supreme Court Rule 27):

Petitioner asserts, petition, p. 7, that "in the circuit court, both upon trial and upon motion for new trial, the question of legality of arrest herein under the Michigan Constitution and under the Constitution of the United States was raised, and that Court refused to consider this claim".[5]

But counsel have not set forth with precision the course of proceedings in either court, nor have they disclosed the inept manner in which petitioner attempted to attack the legality of her arrest:

1. The record does not include a copy of any pretrial motion to suppress evidence alleged to have been seized during an unreasonable search of the petitioner or her person, "houses, papers and effects", 4th Amendment, Federal Constitution, Michigan State Constitution, Article 2, § 10; the denial of such a motion was not asserted (SR 11) as a ground for new trial, nor in petitioner's application for leave to appeal (SR-6-7) as a reason and ground therefor. During argument of the defendants' motion to dismiss

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[5]

It is our position, of course, that if, as counsel state, such questions were first raised in the course of trial or in a motion for new trial, they came too late under prescribed procedure. See cases cited in footnote 4, and In re Reno, 321 Mich. 497; cert. denied, 335 U.S. 885; rehearing denied, 335 U.S. 905; and People v. Paugh, 324 Mich. 108.

(115-120), counsel stated (119) he had filed a motion for the suppression of evidence, but he thought "that has never been passed upon".[6]

2. The record does not include the complaint, warrant, or information, nor does it embrace any motion to quash the information on the ground that the arrest or any preliminary proceedings which followed, was illegal, a requirement under Michigan law, for otherwise such defects would be waived.[7]

3. The witness first sworn to testify for the State, was one Ray Gensler (3-18), the sheriff of Monroe County (3), yet no objection was interposed to any of his direct, res gestae testimony (3-7), nor was there any motion to strike such testimony on the ground that the arrest was illegal, or that the search and seizure (if any) was in violation of constitutional rights. It is our impression that no constitutional rights were asserted until at the close of the case, when the defense had rested, counsel moved to dismiss (115-120).

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[6]

This, under Michigan decisions, would constitute a waiver of such a motion, People v. Kowalek, 296 Mich. 714, 717.

[7]

Cases cited in footnote 5.

Under the rules promulgated by the supreme court of Michigan, *esp.*, Rule 60, to obtain leave to appeal to the higher court from a court of record, the appellant must within the time limited for taking an appeal as of right (Rule 57) take certain definite, prescribed steps toward the settlement of a concise statement of proceedings and facts to be certified by the circuit or trial judge and pursuant to timetable, submit such statement, the application itself, and a supporting brief to the supreme court.

Obviously, then, the denial of such an application may be based upon any number of different grounds, technical or otherwise, and does not necessarily imply that the high court has passed upon the merits of the controversy, that it has decided a constitutional question. For the Michigan supreme court, like this Court, is loath to decide constitutional questions unless necessary.

So in the case at bar, it is crystal-clear to us at least, that in denying the application for leave to appeal, the supreme court of Michigan did so on non-federal grounds of adjective law.

In the concise statement of proceedings and facts (SR 3-7) there is no mention of the filing of a motion to suppress, or a motion to quash, and it is quite evident from the statement itself that the questions presented were raised on motion to dismiss at the termination of the people's case, or upon motion for new trial.

Under the Michigan rule, so often sustained and reaffirmed by her highest court, questions involving evidence seized during an unreasonable search, must be raised upon motion to suppress such evidence; questions involving the legality of an arrest must be raised on motion to quash.

We, therefore, respectfully submit that the Michigan supreme court did not necessarily decide the federal questions now presented, and that appeal was denied on non-federal grounds.

Point Three

No federal question now presented in the petition for certiorari, possesses substance.

This point, we respectfully suggest, may be treated somewhat summarily:

1. The offense of which the petitioner was convicted is defined by Michigan law, Penal Code, § 335, Stat. Ann. [Henderson] § 28.567, as follows:

> "Sec. 335. Any person who shall designedly make any open or indecent or obscene exposure of his or her person . . . shall be guilty of a misdemeanor, punishable by imprisonment in the county jail not more than one [1] year, or by a fine of not more than five hundred [500] dollars".

While it is a misdemeanor, the offense is not cognizable by a justice of the peace,[8] but is prosecuted in the circuit courts upon information.[9]

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[8]

In Michigan, Code of Criminal Procedure, Chap. 14, § 1, Stat. Ann. [Henderson] § 28.1192, justices of the peace have jurisdiction only over criminal offenses punishable by imprisonment not exceeding 3 months or a fine not exceeding one hundred [100] dollars.

[9]

Mich. Stat. Ann. § 28.941.

As construed by our high court, in *People v. Kratz,* 230 Mich. 334, 339, where error was urged against the charge of the court in not making plain that the (indecent) exposure must be public, and where it was contended that "under the charge as given a person might be convicted if the exposure was in a private place".

> " 'Public' and 'private' as applied to places are not absolute in meaning but relative as used in contradistinction of each other. The statute makes no reference to place, either public or private. The gist of the offense is an intentional or designedly made 'open, indecent or obscene exposure of the person', necessarily in the presence of others".

And the court sustained the following charge to jury:

> " 'The term "openly" as used in this information and in the law under which the prosecution is had, means public in the sense that it was not concealed, that it was not private, that it was made in such a place and such a manner as to be a public exposure, that it was not within a concealed place or enclosure, but that it was made publicly *to the people who were there in view,* and by that . . . is not meant necessarily that it was a public ground or in a public place in the sense of its being upon public property. *It may have been upon private property, but it must have been openly and publicly with relation to the people that were there situate' ".* [Emphasis supplied].

2. The supreme court of Michigan has also held in an indecent-exposure-case involving a "nudist camp or colony",

> *People v. Ring,* 267 Mich. 657, 93 ALR 993, Anno. 996,

that one who, as the operator of a nudist camp, goes without clothing in the presence of persons living at the camp, whose sense of decency, propriety and morality is not thereby offended, may nevertheless be found guilty of violating a statute imposing a penalty on any one who shall designedly make "any open or indecent or obscene exposure of his or her person or the person of another".

There is, we respectfully submit in the light of the foregoing judicial construction of a local statute defining a criminal offense, no constitutional right to flout a law which has as its purpose the codification of standards of decency in a community; and those who desire modification of such a code should address their pleas to the legislature of the State, and not to the courts.

3. Moreover, we fail to comprehend the petitioner's claim that the constitutional provisions controlling search and seizure may be applied to the facts in this case.

There was, in the first place, no search or seizure of papers or effects, and no articles of property were later used in evidence.

The transaction occurred in an open field, not within the curtilage, and certainly not in a "castle". And the Constitution does not guarantee the privacy of open lands,

Hester v. United States, 265 U.S. 57, per Mr. Justice Holmes;

f. *People v. Ring, supra*, 267 Mich. 657.

It is therefore our position that the petition for certiorari presents no federal questions of substance.

V

Conclusion.

We, therefore, respectfully submit, on the several grounds asserted in this brief, that the petition for certiorari to the Supreme Court of the State of Michigan should be denied.

Respectfully submitted,

Stephen J. Roth
Attorney General of Michigan

Edmund E. Shepherd
Solicitor General of Michigan

Daniel J. O'Hara
Assistant Attorney General

Counsel for Respondent